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In the
Supreme Court of the United States

OCTOBER TERM, 1992

BOBBY RUSSELL,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether the good faith exception to the exclusionary rule should be applied when government agents knew, prior to the execution of a search warrant, that the warrant was facially defective, because it did not particularize the things to be seized.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at _____ F.2d ____(5th Cir. 1992). It is attached as an Appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 24, 1992. This Court has jurisdiction to review by a Writ of Certiorari under 28 USC Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Four, which says:

> "...[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On August 20, 1986, U.S. Magistrate Norman Gillespie issued a search warrant, authorizing the Internal Revenue Service to conduct a search of Bobby Russell's residence and place of business at 621 and 621 1/2 Carnation Street, Tupelo, Mississippi (R158).[1]

When the affidavit was presented to Magistrate Gillespie, it contained a part III, items (A) through (H) which was a list of items to be seized. IRS Agent Samuel James Baker (hereinafter referred to as Baker) later stated, in testimony in the suppression hearing, that it was his intention that the list of items to be seized was to be photocopied from the affidavit, and attached to the warrant to be served on Russell (T37).

Baker stated in his suppression hearing testimony that he never removed the warrant from the envelope which was given him by the Magistrate, until he served it on Russell the next day, and Baker stated that he did not discover that the warrant did not contain the list of items to be seized, until he served the warrant on Russell, during the later states of the search (T52).

Fellow IRS Agent William Gibson states in his affidavit that he was shown the warrant by Baker on the evening of August 20, 1986, 20 hours prior to the search the next day, and that Gibson noticed that there was no list of items to be seized and that Gibson brought this fact to Baker's attention (R145-146). Gibson and Baker had a discussion about the lack of a list of items to be seized, and Baker stated that it was his recollection that Rule 41 had been changed, and that it was no longer required that warrants contain a list of items to be seized, either on the face or in an attachment to the warrant (R145). Gibson told Baker that he knew of no

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[1]The record in this case consists of the record of the U.S. District Court for the Northern District of Mississippi, and the transcript of a suppression hearing on a Federal Rule of Criminal Procedure, Rule 41(e) motion. References to "R" are to the record, to "T", the transcript.

other occasion where a search warrant had been served without a listing of items to be seized, either on the face of the warrant or in an attachment. Gibson told Baker that every warrant he had ever served had contained a listing of the items to be seized either on the face of the warrant or in an attachment (R145-146).

Agents Baker and Gibson did not contact either Magistrate Gillespie, or the Assistant U.S. Attorney, in order to resolve this question, even though Baker subsequently spoke with Gillespie and the Assistant U.S. Attorney on the morning of August 21, 1986, before the search, in order to add an additional item to the affidavit list (R145).[2]

Gibson states that when the agents first confronted Russell at the search premises, Baker showed Russell the warrant. Russell asked for the list of items to be seized, and was told by Baker that he did not have and was not required to give him such a list (R146).

Gibson's affidavit (which surfaced in December 1990) sharply contradicts the suppression hearing testimony of Baker (which was adduced on September 25, 1986, just one month after the search) where Baker states that he did not open the warrant envelope for any reason, and he did not know of the missing attachment until well into the execution of the warrant (T63, T65-67, T69-70).

The warrant was served on Russell on the afternoon of August 21, 1986, and a wide ranging search was conducted on Russell's residence and business premises.(T81)

On August 29, 1986 a Motion for Return of Unlawfully Seized Property and for Suppression for Use as Evidence, under Rule 41(e), was filed by counsel for Russell (R183). On September 25, 1986 and October 22, 1986, an evidentiary hearing on Russell's Rule 41(e) motion was held before U.S. District Court Judge Honorable L.T. Senter, Jr., at which hearing testified IRS agent Baker, the defendant Russell, and

[2]It is undisputed that the warrant did not incorporate, and was not accompanied by the affidavit (T 24,30).

other witnesses (See transcript of hearing).

On December 16, 1986 Judge Senter issued his memorandum opinion and order overruling Russell's motion to suppress. Said opinion appears at 649 F.Supp. 1405, (R235).

On March 15, 1991, the District Court issued its Memorandum Opinion and Order overruling Russell's Supplemental Motion to Suppress (R150, 154).

On March 28, 1991, the Judgment of the District Court was entered and Russell was sentenced to, 3 year, 3 year, 2 year and 2 year sentences, to run consecutively and a total of Two Hundred Thousand ($200,000.00) Dollars in fines (R155).

On April 5, 1991 the Notice of Appeal was filed on behalf of Russell in the United States Court of Appeals for the Fifth Circuit (R157).

On November 4, 1991 this case was argued orally before the panel of the Court of Appeals for the Fifth Circuit.

On April 28, 1992 the panel issued it's order and decision affirming the opinion of the U.S. District Court for the Northern District of Mississippi.

ARGUMENT:

THIS COURT SHOULD GRANT THE WRIT SINCE THE FIFTH CIRCUIT'S DECISION IS CONTRARY TO BETTER REASONED DECISIONS FROM OTHER CIRCUITS. THE FIFTH CIRCUIT COURT OF APPEALS DECISION IN THE SUBJECT CASE (SEE APPENDIX "A") EFFECTIVELY CREATES A DIVISION AMONG THE CIRCUITS WHICH HAVE INTERPRETED THE APPLICATION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE, AS ANNUNCIATED IN *U.S. V. LEON*, 104 S.Ct. 3405, 3416 (82 L.Ed 2d 677, 697-699 1984) AND *MASSACHUSETTS V. SHEPARD*, 104 S.Ct. 3424 (82 L.Ed 2d 737).

In the subject case, the Fifth Circuit Court of Appeals per-

omitted the application of the good faith exception to the exclusionary rule, even though agent Baker was warned by a fellow agent, prior to the execution of the warrant, that the warrant was invalid because it did not contain a list of items to be seized. (footnote 6 of the opinion at Appendix "A"). The Fifth Circuit seemed to find no fault with the fact that agent Baker misunderstood the requirements of the Fourth Amendment and Federal Criminal Procedure Rule 41, nor that he failed to take reasonable measures to confer with the Magistrate, prior to execution of the warrant, in order to clear up these questions (R145-146). These rulings by the Fifth Circuit are contrary to a line of cases emanating from the First, Ninth and Tenth Circuits. See *U.S. v. Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985); *U.S. v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); *U.S. v. Fucillo*, 808 F.2d 173, 178 (1st Cir. 1987); *U.S. v. Leary*, 846 F.2d 592 (10th Cir. 1988); *U.S. v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989) and *Center Art Galleries-Hawaii, Inc. v. U.S.*, 875 F.2d 747, 750 (9th Cir. 1989). These cases cite *U.S. v. Leon*, 104 S.Ct. 3405, 3421:

> Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized- that the executing officers cannot reasonably presume it to be valid.

The courts in the above cases have refused to apply the good faith exception when the executing agent served a warrant which was facially invalid in failing to particularize the things to be seized. These courts have held that a reasonably well trained officer should know that a warrant is not valid if it does not describe the things to be seized. Also, agents are required to take every step that could reasonably expected of them, in the event there is a question about the validity of the warrant. See *U.S. v. Crozier*, id at 1382:

> Here, there was no mere technical error and the

> agent's conduct was not reasonable. In contrast to the detective in *Shepard*, he did not take "every step that could reasonably be expected of him."..... he obtained no specific assurances from the Magistrate that the overbroad warrant was acceptable. Although the affidavit was more specific, the agent did not have it when he made the search. Because evidence of his good faith was lacking, the application of the exclusionary rule here may deter the police from relying on overbroad warrants.

In the subject case, the Fifth Circuit took some comfort from the fact that agent Baker had with him, at the time of the search, a list of items to be seized. However, this list was not served on Russell. The Ninth Circuit's *Center Art Galleries* case, id at 750, would hold such a search not valid:

> An affidavit can cure the overbreadth of a warrant if the affidavit is "attached to and incorporated by reference in" the warrant...("the affidavit and search warrant must be physically connected so that they constitute one document...and...the search warrant must *expressly* refer to the affidavit and incorporate it by reference using suitable words of reference")...The former requirement assures that "the person being searched has notice of the specific items the officer is entitled to seize"...The latter requirement helps assure that the affidavit actually limits "the discretion of the officers executing the warrant."...In the case before us, the affidavit was not expressly incorporated into the warrant. Moreover, although the government alleges that some of its officers had copies of the affidavit, the government does not claim that the affidavit was physically attached to the warrants or was given CAG as part of the search. (Cites deleted)

We respectfully submit that there is a clear division between the Fifth Circuit's ruling in the subject case, and that line of cases cited from the First, Ninth and Tenth Circuits, with regard to the application of the good faith exception to the exclusionary rule. A Writ of Certiorari should be issued so that the subject case can be reviewed, and so that this Court may resolve the conflict between the circuits.[3]

[3]See Justice White's dissent in *Norton v. U.S.*, 107 L.Ed. 2d 210, No. 88-1899, cert denied, 107 L.Ed. 154, 110 S.Ct. 200, where Justice White notes the conflict between *Norton*, an Eleventh Circuit case, and *U.S v. Leary*, id., (9th Cir.) and *Center Art Galleries*, id., (10th Cir.) and states his opinion that the conflict should be resolved.

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CERTIFICATE OF SERVICE

I, Rhett R. Russell, attorney for Petitioner, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

Mr. Tom Dawson
Assistant U.S. Attorney
P.O. Box 668
Oxford, MS 38655-0668

THIS the 23d day of July, 1992.

Rhett R. Russell

RHETT R. RUSSELL

APPENDIX "A"
U.S.A. v. RUSSELL
United States of America,
Plaintiff-Appellee,
v.
Bobby RUSSELL,
Defendant-Appellant.
No. 91-1406.

United States Court of Appeals, Fifth Circuit.
April 28, 1992.

Defendant was charged with tax fraud and moved to suppress evidence. The United States District Court for the Northern District of Mississippi, L. T. Senter, Jr., Chief Judge, 649 F.Supp. 1402, denied motion. Defendant appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that government agent acted in good faith in objectively reasonable reliance on search warrant missing attachment that listed and described items to be seized.

Affirmed.

1. Criminal Law ¶1139, 1158(2)

Review of objective reasonableness of officer's reliance on search warrant is question of law reviewable de novo, and underlying facts upon which that determination is based are reviewed for clear error. U.S.C.A. Const.Amend. 4.

2. Criminal Law ¶394.4(6)

Government agent acted in good faith in objectively reasonable reliance on search warrant that contained clerical error by omitting attachment which listed and described items to be seized, and, thus, exclusionary rule was inapplicable, even though defendant claimed that another agent pointed out missing list to agent on night before the search. U.S.C.A. Const.Amend. 4; Fed. Rules Cr.Proc.Rule 41(c), 18 U.S.C.A.

3. Criminal Law ¶394.4(6)

Good-faith exception to exclusionary rule does not apply if magistrate is misled by information that affiant knows is false or would have known was false except for reckless disregard of the truth, magistrate wholly abandons judicial role, warrant is based on affidavit so lacking in indicia of probable cause that official belief in its existence is entirely unreasonable, or warrant is so facially deficient in failing to particularize place to be searched and things to be seized that executing officers cannot reasonably presume it to be valid. U.S.C.A. Const.Amend. 4.

4. Criminal Law ¶394.1(1), ¶394.4(1)

Exclusionary rule was adopted to deter unlawful searches by police, not to punish clerical errors of magistrates and judges. U.S.C.A. Const.Amend. 4.

Appeal from the United States District Court For the Northern District of Mississippi.

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges.PER CURIAM:

Defendant Bobby Russell pled guilty to tax fraud and other fraudulent activity. Russell appeals, arguing that the search warrant used to obtain evidence which played an integral part in his conviction was defective and that the good faith exception to warrantless searches does not apply. We disagree, and affirm the district court's orders overruling Russell's motions to suppress this evidence. 649 F.Supp. 1402 (1986).

I.

On August 20, 1986, James Baker - a special agent with the IRS criminal investigation division - applied for a search warrant to the United States District Court for the Northern District of Mississippi. The application

sought permission to search Russell's office[1] and home because he was suspected of tax fraud[2]. The Magistrate Judge found probable cause and issued a search warrant[3].

The search warrant was executed on Russell's residence and place of business the next day. The warrant served on Russell and the warrant in the Magistrate Judge's files, however, failed to include the second attachment describing the items to be seized[4]. During the search,

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[1] Russell was the sole proprietor of BHR Publishing in Tupelo, Mississippi. In his capacity as proprietor of BHR, Russell published newspapers, magazines and calendars, and conducted country music shows for different organizations.

[2]On April 19, 1990, a federal grand jury in the Northern District of Mississippi returned a 226-count Indictment against Russell and his coconspirator, Beverly Bedford. The Indictment alleges various instances of tax fraud, including fraudulent deductions and fraudulent use of IRS Form W-2.

[3] Baker's application for a search warrant was accompanied by a thirteen-page affidavit. Part I of the affidavit described Baker's qualifications and the crimes which Russell allegedly committed. Part II set forth the underlying facts and circumstances which provided probable cause for the issuance of the search warrant. Part III of the affidavit listed the items to be seized during the search.

[4]The warrant, as issued by the Magistrate Judge, was to include two attachments. The first attachment was to describe the premises to be searched, and the second attachment was to describe the items to be seized. These attachments were used because the warrant form had insufficient space. Where the property to be seized was supposed to be listed, the search warrant read "(See attached)" (A copy of Part III of the affidavit from the application and affidavit for search warrant, see *supra* note 3, was supposed to be attached). This second attachment, describing the property to be seized, was omitted from the search warrant. The cause of this defect in the search warrant in unknown. Neither the Magistrate Judge nor Baker could clearly ascertain how the second attachment was omitted from the search warrant. The Magistrate Judge's staff was apparently responsible for compiling the attachments from the affidavit and assembling the warrant. The district court's finding that Baker acted in good faith (see *infra* note 6) suggests that Baker was not responsible for this oversight. See also *infra* note 10.

however, Baker posted a copy of the list of items to be seized, and made a computerized inventory of each item actually seized from Russell's house and office. When the search was completed, Baker served Russell with a copy of the warrant and a copy of the inventory of the items seized. At trial, Russell moved to suppress the evidence seized on the ground that the warrant - which did not include a list of items to be seized during the search - was facially defective. The district court denied Russell's motion and held that the evidence should not be suppressed[5]. Russell appeals[6].

II.

(1) Russell contends that the evidence seized should have been suppressed because the search warrant - missing the attachment listing and describing the items to be seized (see supra notes 3-4) - was defective and

[5] See *Russell v. United States*, 649 F.Supp. 1402 (N.D.Miss 1986).

[6] Prior to his appeal, the district court reconsidered the suppression issue in light of the affidavit of Bill Gibson, a special agent with the Internal Revenue Service. Gibson alleged that on the night of August 20, 1986 - the day before the warrant was executed - he met with Baker, who had applied for the warrant to search Russell's house and office. Gibson allegedly told Baker that the warrant did not contain a list of items authorized to be seized. The district court considered Gibson's testimony, and entered an opinion overruling Russell's supplemental motion to suppress. In its order, the district court stated that there was nothing in the record, including the affidavit of Gibson, to indicate that Baker sought the warrant in anything other than good faith.

On appeal, Russell reasserts that Gibson's affidavit indicates a lack of good faith on Baker's part. As we have noted *infra* note 10, the facts show that Baker understood that the search and seizure was limited to the premises and items listed in the affidavit, and that the scope of the intended search and seizure was not exceeded. Therefore, we do not agree with Russell that Baker either wilfully served a warrant he knew to be defective or that he was ignorant of the Constitution. Moreover, the district court's fact findings regarding Bakers' good faith findings supported by the record (*see infra* note 10) are not clearly erroneous.

because the warrant was not obtained and executed in good faith. Our review of the objective reasonableness of an officer's reliance on a search warrant is a question of law reviewable de novo, and the underlying facts upon which that determination is based are reviewed for clear error. *See United States v. Maggitt*, 778 F.2d 1029, 1035 (5th Cir.1985), cert. denied, 476 U.S. 1184, 106 S.Ct. 2920, 91 L.Ed.2d 548 (1986); *United States v. Tedford*, 875 F.2d 446, 448 (5th Cir. 1989) (citations omitted)(this court accepts facts underlying the trial court's finding of good faith unless clearly erroneous; the court's ultimate determination that officers acted in good faith is a conclusion of law subject to de novo review).

(2) The Fourth Amendment to the Constitution states that warrants shall particularly describe the place to be searched, and the person or things to be seized. Rule 41(c) of the Federal Rules of Criminal Procedure states that a warrant shall identify the property or person to be seized and name or describe the person or place to be searched. *See* Fed.R.Crim.P. 41(c). In their briefs, the parties do not disagree that, because the warrant in this case did not include a list of the items to be seized as is required by the Fourth Amendment and Rule 41(c) of the Federal Rules of Criminal Procedure, the warrant was defective.
Therefore, we will only determine whether the good faith exception to the exclusionary rule applies.

(3) The purpose of the exclusionary rule is to deter police misconduct. See *United States v. Leon*, 468 U.S. 897, 916, 104 S.Ct. 3405, 3417, 82 L.Ed.2d 677 91984). The Court has stated that the exclusionary rule should not be applied to suppress evidence if the evidence was obtained by officers acting in objectively reasonable

reliance on a subsequently invalidated search warrant. See id. at 922-23, 104 S.Ct. at 3421; *Massachusetts v. Shepard*, 468 U.S. 981, 987-88, 104 S.Ct. 3424, 3427, 82 L.Ed.2d 737 (1984)(citation omitted). However, this good faith exception does not apply if: (1) in issuing the warrant the magistrate is misled by information in the affidavit that the affiant knows is false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate wholly abandons his judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause that official belief in its existence is entirely unreasonable; or, (4) the warrant is so facially deficient in failing to particularize the place to be searched and things to be seized that the executing officers cannot reasonably presume it to be valid. See *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421 (citations omitted).

The Government refers us to *Massachusetts vs. Shepard*, 468 U.S. 981, 102 S.Ct. 3424, 82 L.Ed.2d 737 (1984), where the Court discussed a situation somewhat similar to that in this case. In *Shepard*, the Court affirmed the execution of a warrant that authorized a search for "controlled substances," but was actually meant to enable a search for evidence of a murder. The judge attempted to modify the warrant, but failed to incorporate an affidavit stating the items to be searched for. *Id.* at 986-87, 104 S.Ct. at 3426-27. In holding that the evidence was properly admitted notwithstanding the defect in the warrant, the Court stated that the police conduct was objectively reasonable and largely error free, and that it was the judge, and not the police officers, who made the critical mistake. *Id.* at 990-91, 104 S.Ct. at 3429; see also *United States v. Anderson*, 851 F.2d 384, 388-89 (D.C.Cir.1988), cert. denied, 488 U.S. 1012, 109 S.Ct. 801, 102 L.Ed.2d 792 (1989) (discussing *Shepard*). In *Shepard*, the Court noted that suppressing

evidence because the judge failed to make all the necessary clerical corrections, despite his assurance that such changes would be made, would not serve the deterrent function that the exclusionary rule was designed to achieve. See *Shepard*, 468 U.S. at 990-91, 104 S.Ct. at 3429. In this case, we likewise see nothing to be gained by laying fault for this apparent clerical error at Baker's feet[7].

Russell's arguments primarily focus on the objective reasonableness of Baker in relying on the defective warrant. He argues that Baker did not do all that could be reasonably expected to rectify the defective warrant. According to Russell, Baker knew about the missing list of items to be seized because another agent had pointed it out to him the night before the search[8]. Russell contends that, when Baker spoke to the Magistrate Judge on the morning of the search, Baker should have asked about the missing list of items[9]. We find these arguments unpersuasive.

As the Government notes, the evidence indicates that the warrant - defective because of clerical error - was executed in good faith[10]. As the Court noted in *Shep-*

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[7] *See supra* note 4.

[8] See *supra* note 6.

[9] Russell also argues that Baker's misunderstanding about the necessity for the list to be attached to the warrant does not justify the application of the good faith exception. He asserts that the warrant was so defective that a reasonably well-trained agent could not have been expected to rely on the warrant. Likewise, Russell contends that the search grossly exceeded the scope of the probable cause affidavit.

[10] Baker prepared and presented an application for a search warrant which was supported by an affidavit that demonstrated probable cause and set forth the place to be searched and the items to be seized. Specifically, the direct examination of the Magistrate Judge reveals the following exchange:

> Q. During the course of the hearing concerning this warrant, what did you consider in issuing the warrant?

A. ..... I read the affidavit prepared by the special agent and executed before me ..... I looked at the description of the property. I look at the itemized list of things to be seized. I read and studied the facts, the underlying facts of probable cause. And based on looking at the description, I then looked at the search warrant and I signed it, after considering all of the things stated in the affidavit.

Q. Did you make a finding of probable cause?

A. I did make a finding of probable cause. And I looked at the search warrant and signed it.

Record on Appeal, vol. II at 13, *United States of America v. Bobby Russell*, No. 91-1406 (5th Cir. filed Apr. 16, 1991) {"Record on Appeal"} (direct examination of Magistrate Judge):

The record establishes that the search warrant signed by the Magistrate Judge contained an attachment identifying the place to be searched, but did not have the list of items to be seized. *See* Record on Appeal (Government's Exhibit #2: copy of search warrant that was signed and executed by Magistrate Judge on August 20, 1986). Neither Baker nor the Magistrate Judge realized that the list of items to be seized contained in the affidavit was not attached to the warrant as finally assembled, as is supported by the following testimony:

Q. Now, at the time you signed the warrant, were you aware that the things to be seized were inadvertently omitted from the-

A. I was not at that time. I was not aware of that, at that time, that that has been omitted from the search warrant.

Q. Had you known that, would you have signed the warrant?

A. I would have seen to it that it would have been attached before I signed it.

* * * * * * *

Q. Do you have any idea of what happened to the list that should have been attached to the warrant?

A. I cannot recall.

* * * * * * *

A. So I went back in my file, when you filed your motion, and I did not have a copy of those items attached to my copy of the search warrant. I do recall seeing those items listed in the affidavit.

Record on Appeal at 15, 17, 23 (direct and cross examination of Magistrate Judge); *id.* at 63 (cross examination of Baker):

Q. Well, you understood that you had a copy of the whole warrant, didn't you?

A. Actually, I later learned during the execution when I handed him the return that in fact the attachment was not on there. But I didn't question the fact that the attachment for items to be seized was not on the warrant. And the reason I didn't question it was

because of a fairly unusual event, at least in my experience with warrants is concerned, at the time I was handed the document to be served on Mr. Russell, at my request, prior to going to the Magistrate's Office, Mr. Dawson asked the Magistrate if he would seal the file. The file included necessarily the affidavit. Because Item 3 of the affidavit was in fact the item 2 attachment to the warrant. When I handed Mr. Russell the file, even though I noticed it wasn't on there, I assumed it was omitted by the Magistrate because it didn't have to be attached.

Q. You assumed that when you left the Magistrate's office?

A. No. I didn't even know it wasn't on there. I didn't think about it, whether it was or wasn't. I never looked at the file. I never looked at the document given to me by the Magistrate at all until 9:50 p.m. on the 21st of August when I gave it to Mr. Russell.

There is also an abundance of other testimony in the record to suggest that the Magistrate Judge and Baker were aware of the warrant's limitations and acted accordingly:

-The facts indicate that the Magistrate Judge and Baker understood that the search and seizure was limited to the premises listed and the list of items contained in the affidavit:

Q. Now, Magistrate Gillespie, through the process you've talked about issuing this particular warrant, what was your understanding about the searching and seizing authority of Special Agent Baker?"

A. That under the warrant that he had the authority to search the property described in the search warrant and seize the items listed therein.

Q. Would that list be identical to the list attached to the affidavit?

A. That's right.

Record on Appeal at 17 (direct examination of Magistrate Judge); *id.* at 53 (direct examination of Baker):

Q. Now, what did you believe was your authority to search with respect to the place to be searched?

A. I was convinced that my authority to search the premises.... was limited solely to the items listed in the affidavit that I filed with the Magistrate under oath and only Section 3 items subject to being seized. -

The facts show that, on the morning of the search, Baker called the Magistrate Judge to add an item that had been omitted from the affidavit's list:

Q. Did you call the Magistrate?

A. Yes. I was specifically concerned about adding the item to the warrant. I knew that I could not add the item to the warrant or search for it if in fact I did not have the approval of the Magistrate.

* * * * * * *

A. At approximately 10:06 a.m. I called the Magistrate. At which

time I informed the Magistrate that due to what appeared to be a typing error in the attachment of items to be searched to the affidavit, which included the warrant .... there was omitted an item I for Equipment or Devices used to prepare any document or record described herein. And I have the original, a copy of the original document that I wrote on .... which is the third page of this document, states "Added 10:06 a.m., 8-21-86 A.P.P. telephone Magistrate Gillespie."

Id. at 45 (direct examination of Baker). - In addition, the subsequent seizure of items from Russell's home and business was limited to the items from the list in the affidavit:

Q. Now, these five agents, you said had the authority to search and therefore given a copy of the items to be seized?

A. That's correct. They were the only persons.

Q. Who was the only person who had authority to make the judgment to seize an item?

A. I was the only person on the entire search team that was authorized physically to make a decision to seize any item.

Q. Now, did you have a backup for that decision?

A. Yes, I did. I had a (protective) device, as I thought of it at the time, in that I had another agent checking my decision regarding the applicability of the item to be seized against the items listed in the inventory.

Q. Who was that?

A. Special Agent Ransig. And I gave him the original copy of the items to be seized section, which I had in my possession, and I put his name at the top of that document, which he kept in his possession the entire time the search was executed.

Q. Did Mr. Ransig also have any additional duties during the search with respect to making a return?

A. Yes, he did. The reason that I had him postured to double check any decision I made was because his primary duty was not to search but inventory on a computer terminal, which we set up on the premises of Mr. Russell's business, all of items that were subject to being seized.

Q. What advantage did that give to you in the course to the owner of the premises?

A. It insured that only the items subject to seizure were in fact being seized.

Q. What about making an immediate return computer printout?

A. That was primarily the reason that we use the computer in the first place was so that we could lend a much more accurate, complete and quicker return after execution of the search.

Id. at 47-48 (direct examination of Baker). -Baker also posted a copy of the list of items to be seized on the wall of Russell's office:

A.The particular one, [copy of items to be seized] which I have is a copy of, was actually posted on the wall in the room described at Room 1 on the drawing of the premises diagram of the floor plan right next to the computer, right across, I would say within six or seven feet of Mr. Russell's desk.

Id. at 48-49 (direct examination of Baker). - And finally, Baker orally advised Russell of the items to be seized when he first arrived and then left Russell a computerized listing of the items to be seized:

Q. Now, was a copy of the warrant left with Mr. Russell?

A. Yes.

Q. And, in addition, the computerized printout of things that had actually been seized was left with Mr. Russell?

A. That's correct.

Q. Now, in addition to that, did you orally advise Mr. Russell of the things that were going to be seized?

A. Yes.

Id. at 49 (direct examination of Baker).

pard, the exclusionary rule was adopted to deter unlawful searches by police, not to punish the clerical errors of magistrates and judges. *See Massachusetts v. Shepard*, 468 U.S. 981, 990, 104 S.Ct. 3424, 3429, 82 L.Ed.2d 737 (1984) (citation omitted)[11]. Accordingly, we find that the *Leon* good faith exception applies, and we affirm the district court's orders overruling Russell's motions to suppress.

The judgment of the district court is AFFIRMED

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[11] *See also United States v. Anderson*, 851 F.2d 384, 388-89 (D.C. Cir. 1988). In *Anderson*, an affidavit prepared in support of a state search warrant specified in detail the items to be seized, but the affidavit was not attached to or incorporated by the warrant. In holding that the investigating officers had an objectively reasonable basis for their mistaken belief that their search of a motel room was authorized by a valid warrant, the D.C. Circuit noted that: (1) the investigating officers presented the affidavit to a neutral judge along with an affidavit submitted earlier in support of a federal warrant, (2) the search was executed by the same officers who had prepared the affidavits, and (3) the scope of the search was limited to the items listed in the affidavits. *Id.* Similarly, in *United States v. Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir.1990), the agent who applied for a search warrant prepared an affidavit detailing the illegalities of which the defendant was suspected and presented it to a neutral and detached magistrate. The magistrate determined that probable cause existed to search the defendant's apartment, but neglected to incorporate the agent's affidavit into the warrant. *Id.* The D.C. Circuit noted that, when the magistrate signed the warrant at issue with the affidavit apparently attached although not specifically incorporated into the search warrant, the agent could have reasonably concluded that the scope of the warrant was limited to materials supporting the allegations contained in the affidavit. *Id.* The court also noted that the same agent who prepared the affidavit and obtained the warrant also oversaw the execution of the warrant. *Id.* Thus, the court held that the agents took every step that could reasonably be expected of them, and that a reasonable police officer would have concluded that the warrant authorized a search for the materials outlined in the affidavit. *Id.* (citations omitted).

Supreme Court, U.S.
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No. 92-165

In the Supreme Court of the United States

OCTOBER TERM, 1992

BOBBY RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the good-faith exception to the exclusionary rule was properly applied where the magistrate who issued the search warrant inadvertently failed to attach to the warrant a list of the items to be seized.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-16) is reported at 960 F.2d 421. One of the opinions of the district court is reported at 649 F. Supp. 1402.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1992. A petition for rehearing was denied on May 28, 1992. The petition for a writ of certiorari was filed on July 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to a plea agreement in which he reserved the right to appeal the denial of his motion to suppress evidence, petitioner was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of using a false social security number, in violation of 42 U.S.C. 408(g)(2); and two counts of making a false tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to ten years' imprisonment and ordered to pay a $200,000 fine. The court of appeals affirmed.

1. After petitioner was indicted in the United States District Court for the Northern District of Mississippi, he filed a motion to suppress evidence seized in a warrant-authorized search of his office and residence. The motion alleged that the warrant was facially defective because it failed to include an attachment describing the items to be seized.

After a hearing, the district court denied petitioner's motion to suppress. 649 F. Supp. 1402 (N.D. Miss. 1986); Pet. App. 10. The evidence at the suppression hearing showed the following: On August 20, 1986, Internal Revenue Service Special Agent James Baker applied for a search warrant before a United States magistrate. Baker's affidavit in support of his application for a search warrant included a list of the particular documents and items to be seized. There was insufficient space on the face of the warrant form to include the list of items to be seized, so the list was intended to be appended as an attachment to the warrant. Pet. App. 11 n.4.

When Baker applied for the warrant, he presented the complete application to the magistrate. The magistrate questioned Baker specifically about the list of items to be seized. On the basis of Baker's

affidavit, the magistrate found probable cause, and he authorized the search warrant. Pet. App. 11; 649 F. Supp. at 1404. The magistrate signed the warrant and gave Baker the relevant documents to be served on petitioner when the warrant was executed. Gov't C.A. Br. 5-6. As a result of an apparent oversight on the part of the magistrate's staff, however, the list of items to be seized was not attached to the warrant. Pet. App. 11 n.4.

Baker conducted the search the following day. During the search, Baker posted a copy of the list of items to be seized, and a computerized inventory was made of all items actually seized. Pet. App. 11-12. At the conclusion of the search, Baker served petitioner with a copy of the warrant—without the attachment specifying the items to be seized—and a copy of the inventory of seized items. *Id.* at 12. At that time, Baker realized that the attachment was missing, but he assumed that it had been omitted from petitioner's copy of the warrant because the magistrate had earlier ordered the file in the case sealed. Gov't C.A. Br. 8-9. Baker believed that the warrant was valid so long as the copy of the warrant in the magistrate's file included the attachment specifying the items to be seized. *Ibid.*

On the basis of those facts, the district court found that both the magistrate and Baker understood the search to be limited to those items specified in Baker's affidavit, even though the warrant did not incorporate the affidavit by reference and did not include the attachment specifying the items to be seized. 649 F. Supp. at 1404, 1407. The court also found that Baker "sought and executed the warrant in good faith," and that "his actions were objectively reasonable in executing the warrant authorized by the United States magistrate." *Id.* at 1408. Ac-

cordingly, the court held that the good-faith exception to the exclusionary rule applied in this case and rendered the seized evidence admissible. *Id.* at 1407 (citing *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984)).

2. Petitioner then filed a supplemental motion to suppress, relying on an affidavit from Internal Revenue Service Special Agent William Gibson. Gibson's affidavit stated that he met with Baker on the night before the search and was shown a copy of the search warrant. Gibson stated that he told Baker that the warrant did not contain a list of items to be seized. Pet. App. 12 n.6.

The district court rejected petitioner's supplemental motion. The court found that there was nothing in the record, including Gibson's affidavit, to indicate that Baker acted other than in good faith. Pet. App. 12 n.6.

3. The court of appeals affirmed. Pet. App. 9-16. Noting that the parties agreed that the warrant was defective, the court turned to the question whether the good-faith exception to the exclusionary rule was applicable on the facts of this case. *Id.* at 13. The court explained that "the exclusionary rule should not be applied to suppress evidence if the evidence was obtained by officers acting in objectively reasonable reliance on a subsequently invalidated search warrant." *Id.* at 13-14 (citing *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984)). Analogizing this case to *Sheppard*, in which the Court declined to suppress evidence where "the judge, and not the police officers, * * * made the critical mistake," the court of appeals stated that "[i]n this case, we likewise see nothing to be gained by laying fault for this apparent clerical error at Baker's feet." Pet. App. 14-15.

The court of appeals specifically rejected petitioner's claim that Gibson's affidavit evidenced a lack of good faith on Baker's part. Observing that "the facts show that Baker understood that the search and seizure was limited to the premises and items listed in the affidavit, and that the scope of the intended search and seizure was not exceeded," the court concluded that the Gibson affidavit did not render clearly erroneous the district court's finding that Baker acted in good faith. Pet. App. 12 n.6.

The court also rejected petitioner's claim that Baker's reliance on the warrant was not objectively reasonable. Pet. App. 15-16. The court pointed to ample evidence in the record supporting the district court's finding that Baker acted in good faith, including the facts that (1) Baker's affidavit demonstrated probable cause and described the premises to be searched and the items to be seized; (2) neither Baker nor the magistrate realized that the list of items to be seized was missing from the warrant as finally assembled; and (3) Baker and the magistrate were aware of the limitations on the items to be seized and acted accordingly. *Id.* at 15 n.10. Therefore, the court concluded that the good-faith exception to the exclusionary rule was applicable. *Id.* at 16.

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the courts below erred in concluding that the good-faith exception to the exclusionary rule governs this case. He asserts that the exception is inapplicable because the search warrant was facially deficient in that it failed to particularize the items to be seized. He further argues that Agent Baker failed to take reasonable steps to determine the validity of the warrant.

Petitioner's fact-bound claim does not warrant further review.

The court of appeals correctly sustained the district court's finding that Agent Baker acted in good faith in obtaining and executing the warrant. The seized evidence was therefore properly held admissible under this Court's decisions in *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Leon*, this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity," particularly when "an officer acting with objective good faith has obtained a search warrant from a judge or a magistrate and acted within its scope." 468 U.S. at 919, 920. In such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921.

In *Massachusetts* v. *Sheppard*, the Court applied the good-faith exception to a search warrant that, like the warrant at issue in this case, insufficiently described the items to be seized. In *Sheppard*, the warrant incorrectly identified the items to be seized as evidence of narcotics possession or use, when in fact the items at issue were evidence of a murder. 468 U.S. at 986 & n.2. Relying on *Leon*, this Court reversed the suppression of the seized evidence, because the Court "refuse[d] to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Id.* at 989-990.

The same considerations that prompted this Court to apply the good-faith exception in *Leon* and

Sheppard are present here. The record in this case is replete with evidence supporting the findings of both courts below that Agent Baker obtained and executed the warrant in good faith. Baker prepared an extensive affidavit that demonstrated probable cause and described with particularity the premises to be searched and the items to be seized. The magistrate found probable cause to justify the search and approved the description of the property to be seized. At the outset of the search Baker posted a copy of the list of items to be seized, and at the completion of the search he provided petitioner with a computerized list of all the items that had been seized. Most importantly, Baker confined the scope of the search to the parameters of the affidavit. Thus, contrary to petitioner's contention, Baker "took every step that could reasonably be expected of [him]." *Sheppard*, 468 U.S. at 989; see *United States* v. *Anderson*, 851 F.2d 384, 388-389 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012 (1989); *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990).

As the courts below concluded, the warrant in this case was defective simply because the magistrate's staff failed to attach to the warrant form the list of items to be seized, even though the list had previously been prepared by the executing agent. Since "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," *Sheppard*, 468 U.S. at 990, such a clerical error does not require exclusion of the seized evidence. *Id.* at 991.[1]

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[1] Petitioner points to Agent Gibson's affidavit indicating that, prior to conducting the search, Baker knew that the list of items to be seized was missing from the warrant. Pet. 5. Baker, however, was under the impression that the list of items

2. Petitioner contends (Pet. 5-7) that the decision below is in conflict with the decisions of the First, Ninth, and Tenth Circuits in *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 750 (9th Cir. 1989); *United States* v. *Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989); *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988); *United States* v. *Fuccillo*, 808 F.2d 173, 178 (1st Cir.), cert. denied, 482 U.S. 905 (1987); *United States* v. *Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); and *United States* v. *Crozier*, 777 F.2d 1376, 1382 (9th Cir. 1985). That contention is incorrect.

In each of the cases cited by petitioner, the courts of appeals refused to apply the good-faith exception when police officers relied on search warrants later found to be impermissibly overbroad. Those courts found that the search warrants were so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably have presumed that the warrants were valid. Cf. *Leon*, 468 U.S. at 923. In this case, by contrast, the warrant was not so facially deficient as to make it unreasonable for Agent Baker to presume that the warrant was valid. The proposed warrant form referenced an attachment listing the items to be seized, and Baker included the referenced attachment when he presented the warrant application to the magistrate. The courts below found as a matter of fact that neither the magistrate nor Baker realized that the list of items to be seized was not attached to the warrant as finally assembled and filed.

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to be seized was not required to be attached to the version of the warrant served on petitioner so long as it was attached to the warrant in the magistrate's sealed file, and he believed that the filed copy of the warrant contained an attached list of the items to be seized. Gov't C.A. Br. 25-26.

When Baker discovered that the list was not attached to the warrant forms in his possession, he assumed that the magistrate's office had not provided him with the list because the magistrate had sealed the file. Underlying that assumption was his reasonable (though mistaken) belief that the attachment was affixed to the version of the warrant in the magistrate's file. Accordingly, the cases cited by petitioner are inapposite, because in none of those cases did the officers executing the warrant have reason to believe that the requisite particularized list of items to be seized was in fact attached to the warrant. Petitioner has failed to demonstrate that any other court of appeals would reach a different result on the unusual facts of this case. Accordingly, no further review is warranted.[2]

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[2] Petitioner errs in contending (Pet. 6) that the Ninth Circuit would have decided this case differently under the authority of *Center Art Galleries-Hawaii, Inc.* v. *United States*, *supra*. Petitioner points to language in *Center Art* indicating that an affidavit cannot cure the overbreadth of a warrant unless the affidavit is attached to and incorporated by reference in the warrant, 875 F.2d at 750, but that language is inapposite. In this case, the lower courts did not rely on Baker's unattached affidavit to cure the overbreadth of the warrant; rather, they looked to the affidavit as further evidence of Baker's good faith. See *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988) ("although the [unincorporated] affidavit cannot be used to cure the warrant's overbreadth, the possession of the affidavit when the officers conduct their search * * * is evidence of good faith under *Leon*"); see also *United States* v. *Maxwell*, 920 F.2d 1028, 1034 (D.C. Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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